Supreme Court, U.S.
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No. 92-1934

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

J.M., Individually

Petitioner,

-against-

V.C.,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of

BRIEF OF PETITIONER IN OPPOSITION TO RESPONDENT'S MOTION FOR SANCTIONS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

Introduction 2

I. THIS COURT NOW HAS UNCONTROVERTED JURISDICTION OF THIS CASE UNDER 28 U.S.C. §1257. THE FILING OF A PRIOR PETITION FOR DISCRETIONARY REVIEW IS IRRELEVANT TO BOTH THE COURT'S JURISDICTION AND THE MERITS OF THIS PETITION. 3

A. THIS COURT HAS JURISDICTION OF THIS PETITION UNDER 28 U.S.C. §1257 AND THAT ISSUE IS NOT IN CONTROVERSY. 3

B. THE FILING OF THE PETITION IN THE CHILD'S CASE IN 1992 NEITHER IMPAIRS THE COURT'S PRESENT JURISDICTION NOR LIMITS THE ISSUES UNDER REVIEW. 6

II. J.M.'S PETITION PRESENTS MERITORIOUS ISSUES WHICH HAVE NEVER BEEN DECIDED BY THIS COURT AND ISSUES THAT ONLY THIS COURT CAN RESOLVE. ASPECTS OF RESPONDENT'S MOTION SERVES TO ILLUSTRATE WHY CERTIORARI SHOULD BE GRANTED IN THIS CASE. 10

III. THIS CASE PRESENTS THE BEST OPPORTUNITY FOR THIS COURT TO REVIEW THE SUBSTANTIVE ISSUES IT DIRECTLY PRESENTS, INCLUDING: WHEN DOES THE LIFE OF THE CHILD BEGIN AND WHETHER THE CHILD HAS RIGHTS PRIOR TO BIRTH. 14

CONCLUSION 18

TABLE OF CONTENTS FOR APPENDIX

Affidavit of J.M. A-1

Affidavit of Harold J. Cassidy, Esq. A-5

Portion of Transcript of Proceedings
Superior Court of New Jersey
Chancery Division - March 19, 1992 . . . . . A-14

Portion of Brief of J.M. Filed in
New Jersey Supreme Court on Motion
for Leave to File Overlength Brief
on Appeal to that Court A-19

TABLE OF AUTHORITIES

CITATIONS:

Atlantic City Casino Assoc. v. Kimmelman,
508 A.2d 203 (1985) 10

Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth,
262 A.2d 881 (1970) 10

DeSimone v. Greater Englewood Housing Co.,
267 A.2d 50 (1970) 10

Enourato v. N.J. Buildg.,
440 A.2d 42 (1981) aff'd 448 A.2d 449 (1982) 10

Gilborges v. Wallace,
379 A.2d 269 (1977) 10

Hudson City v. Hampton Gardens Ltd.,
438 A.2d 323 (1981) 10

In the Matter of Baby M,
537 A.2d 1237 (1988) 10

In the Matter of Conroy,
486 A.2d 1219 (1985) 10

Leona Benton v. David Kessler 12

Morales v. City of Hudson,
566 A.2d 191 (1989) 10

Roe v. Wade,
410 U.S. 113 (1973) 10, 15

State v. Davis,
477 A.2d 308 (1984) 10

State v. Maure,
573 A.2d 186 (1990) 10

Zoneraich v. Overlook,
514 A.2d 53 (App. Div. 1986) 9

STATUTES:

28 U.S.C. §1257 . . . . . 1, 2, 3, 4, 6, 18

INTRODUCTION

The attorneys for V.C. have moved this Court to impose sanctions and damages against petitioner and his counsel.[1] In opposition to the motion J.M. relies upon his petition and his reply brief previously filed with the Court and submits his personal affidavit, the affidavit of the counsel of record, the brief contained in these papers in opposition and additional appendices relevant to this motion.

STATEMENT OF THE CASE

The petitioner's statement of the case is found in the petition at p. 3 to 10. A supplemental statement of the case is found in petitioner's reply brief at p. 13 to 16. In addition, further procedural facts and information pertinent to this motion are contained in the argument found below.

SUMMARY OF ARGUMENT

The case of J.M. v. V.C. is probably the best case and the best opportunity for this Court to review and decide important issues under the Fourteenth Amendment which have never been decided by this Court. J.M.'s petition is properly before this Under under 28 U.S.C. §1257, and the filing of a petition in 1992 neither impairs this Court's jurisdiction nor limits the issues under review. The respondent's motion, and the character of her arguments in support of it illustrates the need for this Court to grant certiorari in this case. The motion must be denied.

[1] There is no evidence in the record that V.C. has personally approved or sanctioned the motion or is even aware of the fact that it has been filed.

ARGUMENT

Introduction

The argument of V.C.'s attorneys on their motion has essentially two elements, neither of which support the denial of certiorari, much less imposition of sanctions, and both, when carefully examined, actually support reasons why certiorari should be granted in this case.

First, V.C.'s attorneys argue that J.M. should be sanctioned because he has previously filed a petition in this Court in 1992. V.C., however, does not now argue that this petition is not properly before this Court or that the Court lacks jurisdiction based upon "finality" under 28 U.S.C. §1257. In fact, V.C. strenuously argued that this Court actually lacked jurisdiction in 1992 to hear any aspect of the case and she expressly argued that the only time this Court would have jurisdiction would be when this precise petition would be filed.[2]

The second element of respondent's argument is that the issues J.M. raises have been previously resolved by this Court and J.M. and future litigants should be punished for attempting to present them. In fact, a fair review of the record on this petition will reveal that V.C. has not responded to the real issues presented by

[2] It should be obvious why a petition was filed in 1992 although the case was still pending in the Appellate Division. See argument below at p. 3 to p. 12; see also, affidavit of Harold J. Cassidy at A-5 to A-13. J.M. had acknowledged that his case, in the summer of 1992, was indeed still pending in the Appellate Division of the Superior Court of New Jersey. At that time J.M. simply argued that the Court could hear the case in its discretion, not that it was the only time the Court would have jurisdiction.

this case and none of the authority she cites has directly decided the substantial constitutional questions of first impression J.M. has raised. That the Court has never ruled on these important issues supports the need for review in this case, not sanctions to silence J.M. and others similarly situated.

I. THIS COURT NOW HAS UNCONTROVERTED JURISDICTION OF THIS CASE UNDER 28 U.S.C. §1257. THE FILING OF A PRIOR PETITION FOR DISCRETIONARY REVIEW IS IRRELEVANT TO BOTH THE COURT'S JURISDICTION AND THE MERITS OF THIS PETITION.

V.C. argues, without a legally cognizable basis, that this petition is "frivolous" because J.M. filed a petition with the Court in 1992 while his case was still pending in the Appellate Division of the Superior Court of New Jersey. The petitions filed in this Court in June of 1992 are irrelevant to both the jurisdiction of this Court and the merits of the petition.

A. THIS COURT HAS JURISDICTION OF THIS PETITION UNDER 28 U.S.C. §1257 AND THAT ISSUE IS NOT IN CONTROVERSY.

This petition was filed seeking review of the final order of the New Jersey Supreme Court dated March 9, 1993, which finally resolved J.M.'s appeal to that court. It is, without any doubt, a final judgment rendered by the highest Court of the State of New Jersey and this Court has jurisdiction under 28 U.S.C. §1257. The respondent does not argue otherwise. Neither her response brief, nor her motion for sanctions contain any suggestion that this Court lacks jurisdiction under 28 U.S.C. §1257.[3] In fact, when J.M.

[3] V.C. does challenge jurisdiction, but based solely upon "standing" and "state action". J.M.'s petition and reply brief address those arguments. Here, J.M. only refers to the nature of the order appealed from as it relates to jurisdiction.

filed the petitions in June of 1992, V.C. argued to this Court that because J.M.'s individual case was pending in the Appellate Division of the Superior Court of New Jersey, and the child did not exist, this Court was barred from reviewing both J.M.'s case and the "child's case" and the Court was without jurisdiction until J.M.'s individual case was finalized and this particular petition was filed. The point concerning J.M.'s case is best made by quoting V.C.'s argument to this Court at that time in 1992:

> A. There Is No Final Judgment Regarding Petitioner's Claims As An Individual.
>
> Petitioner initiated this case in the State trial court with a complaint seeking an injunction prohibiting respondent from obtaining an abortion. Petitioner brought the complaint on behalf of himself and as guardian *ad litem* for the fetus. ...
>
> Following the New Jersey Supreme Court's order denying him leave to appeal, petitioner returned to the trial court and moved for reconsideration of the order dismissing the complaint brought on behalf of petitioner individually. When the motion for reconsideration was denied, petitioner filed a notice of appeal of the trial court's dismissal of his individual claim. *This appeal was as of right and timely filed, and it is still pending in the Appellate Division of the New Jersey Superior Court.*[2] (Emphasis not in original.)
>
> Under 28 U.S.C. § 1257, Supreme Court review of State court decisions is available only with respect to "[f]inal judgements or decrees rendered by the highest court of a State in which a decision could be had." This "final judgment rule" is the first requirement for jurisdiction under Section 1257. Generally, to be reviewable the State court judgment "must be subject to no further review or correction in any other state

[2] Petitioner's appeal to the Appellate Division is as of right pursuant to N.J. Ct. R.2:2-3(a)(1). Although the notice of appeal was filed more than 45 days after the order dismissing the complaint brought by petitioner individually, *see* N.J. Ct. R. 2:4-1(a), the time for filing was properly tolled by petitioner's motion for reconsideration. *See* N.J. Ct. R 2:4-3(e); N.J. Ct. R. 4:49-2.

tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945).

The finality rule "serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159 (1973).

Although a State trial court order may qualify for review under Section 1257, this is true only if the order cannot be reviewed by *any* State appellate court. *See Grovey v. Townsend*, 295 U.S. 45, 47 (1935). But where there is an appeal as of right in a higher court, or even if discretionary review is available, such review must be sought. *See Benton v. Maryland*, 395 U.S. 784, 786 (1969); *Tumey v. Ohio*, 273 U.S. 510, 515 (1972).

In this case, petitioner has properly taken an appeal as of right from the trial court's decision to dismiss his individual complaint, and that appeal is still pending in the New Jersey Superior Court, Appellate Division. *The appeal raises all the same federal constitutional issues petitioner seeks to raise before this Court. This pending appeal in the New Jersey State court system bars review of petitioner's claim in this Court.* (emphasis not in original.)

Citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), however, petitioner argues that the pending State court appeal does not preclude jurisdiction under Section 1257. (Citation omitted.) ...

But although *Cox* represents the "practical rather than a technical construction" this Court has applied to the finality requirement, *see Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949), this approach is not meant to "swallow the rule" of finality embodied in Section 1257, *Flynt v. Ohio*, 451 U.S. 619, 622 (1981), and in situations falling outside the categories mentioned in *Cox*, it still remains true that the existence of pending State court proceedings will preclude review in this Court. ...

None of the *Cox* exceptions to the finality rule

> apply in this case simply because the New Jersey Supreme Court's decision never reviewed the trial court's dismissal of petitioner's complaint brought on behalf of himself at all, but instead merely denied leave to appeal. *The issues raised in petitioner's pending appeal in the New Jersey Appellate Division are not collateral state-law issues, but are the very same federal issues petitioner seeks to bring before this Court. Consequently, petitioner's federal issues have not yet been conclusively adjudicated in the State courts, and there is no final judgment on his federal claims brought as an individual.* Therefore, this Court lacks jurisdiction under Section 1257.[3] (emphasis not in original)
>
> [3] Petitioner's reliane on 28 U.S. §1651 as an alterantive basis for jurisdiction is misplaced. ...

It is clear that [1] the Court now has jurisdiction of this case; [2] there has never been a review of this case on the merits; and [3] V.C. expressly acknowledges that there is nothing about the nature of the order from which review is sought that prohibits jurisdiction under 28 U.S.C. §1257.

B. THE 1992 FILING OF THE PETITION IN THE CHILD'S CASE NEITHER IMPAIRS THE COURT'S PRESENT JURISDICTION NOR LIMITS THE ISSUES TO BE REVIEWED.

The petition filed in this Court in the child's case in 1992 does not preclude this Court from reviewing any of the issues J.M. individually litigated in the State court, including those pertaining to the rights of the child. There are five reasons which, taking separately and in combination, support this conclusion.

First, the child had died before a petition could be filed in this Court. Although the child was a separate, complete, unique, individual person prior to death, that person was no longer alive to prosecute the action after March 24, 1992 and had never been

given an opportunity to appeal with a meaningful hearing.

Second, even while the child was alive the New Jersey Courts never appointed a Guardian Ad Litem in the "child's case,"[3] the child lacked legal capacity to prosecute the action,[4] and therefore no person was given the legal authority to prosecute the child's case. Indeed, the Chancery Court's dismissal of J.M.'s individual claim was based upon its rulings that J.M. had no standing to prosecute the child's case, that J.M. had no right to be the Guardian, and that the child had no right to be represented by his or her father - all of which are among the very issues litigated in J.M.'s individual case.

Third, a denial of certiorari in this case based upon the filing of the child's petition would require a specific finding that the March 24, 1992 order was the *only* order from which the petitioner could seek review of the child's rights issues. Such a ruling would require this Court to hold that the child was in fact a complete, separate, unique human being capable of prosecuting his

[3] The Chancery Court's comments made it clear that the Court believed that J.M. had no standing to prosecute the child's case, but that the Court had to appoint a Guardian or there was no "case" to prosecute. Nonetheless, the Court never entered an order making an appointment. see, portions of the proceedings in the Chancery Division on March 19, 1992 found at A-14 to A-18. The Court never thereafter had a chance to appoint a guardian because the child died five days later on March 24.

[4] In New Jersey a child does not have legal capacity to litigate a civil suit before the age of 18 years. N.J.S.A. 17B-1 et seq. Pursuant to Court rules, all children under that age must be represented by a Guardian Ad Litem. (see, R. 4:26-2) and in some cases the rule specifically authorizes the appointment of such a guardian for children after conception, but prior to birth. See, R 4:26-3(a) and 4:26-3(c).

or her case - one of the most important issues presented by J.M.'s petition and one which this Court has never ruled upon. For that to be the basis for denying the writ on this petition, this Court would be required to make that explicit determination now.

Fourth, regardless of the fact that the child, before the child's life was terminated on March 24, 1992, was a living person, and whether or not the denial of the child's petition in October of 1992 is viewed as dispositive of the "child's case," J.M., under both New Jersey and Federal law, is nonetheless entitled to litigate all the issues his complaint presented including the rights of the child. Neither the doctrines of *res adjudicata* nor collateral estoppel bar J.M. individually from litigating issues that could be inferred to have been litigated by the child's case.[5] V.C. argued to the New Jersey Supreme Court in November, 1992 that J.M. should not be permitted to file an overlength brief which addressed all of the child's rights issues. The New Jersey Supreme Court rejected V.C.'s contentions and entered the order granting J.M. leave to file the arguments.

Finally, and perhaps most importantly, this petition is the only practical opportunity that this Court has been given to review the important issues this case presents. The death of the child, and the policy behind the non-mootness doctrine in pregnancy cases, requires this Court to give J.M. a practical opportunity to present all of the issues once his case was finally reviewed by the New

[5] See portion of one of J.M.'s briefs filed in the New Jersey Supreme Court which addresses this point found at A-19 to A-27 following this brief.

Jersey Supreme Court. The death of the child rendered J.M.'s the only case to review.

The policy behind the non-mootness doctrine expressed in *Roe v. Wade*, 410 U.S. 113, 124-125 (1973) is that the law cannot be so rigid that its application would effectively deny review. J.M. aggressively and diligently sought review of the issues at every level. The record in his own case was not complete until March 11, 1993, when the final order of the New Jersey Supreme Court was entered that day. Until them J.M. was not *entitled* to file a petition that would cover all of the issues he raised in this case. By the rule of law epitomized by *Roe*, J.M. is entitled to a practical opportunity to have all issues reviewed.

Under New Jersey law there were two factors which required the New Jersey Supreme Court to permit argument on all of the issues presented by J.M.'s individual case. First, there were the special circumstances that existed on March 24, 1992 which prevented the case from obtaining, and the New Jersey Supreme Court from providing, a full and complete hearing and determination of the issues. See, *Zoneraich v. Overlook*, App. Div. 514 A.2d 53, 58-59 (1986). On March 24, 1992, the New Jersey Supreme Court felt compelled to vacate the restraints expeditiously, thereby terminating the child's life, or it would be in violation of what it apparently believed was the mandate of this Court. Consequently, the Court did not provide a meaningful appeal. Second, the New Jersey Courts have found, that, as a matter of law, even in situations where collateral estoppel would otherwise have

application, where the public interest militates against the preclusive effect of a prior order, the Court should entertain an appeal. *Zoneraich v. Overlook, supra.*[2]

Granting review with adequate time to determine the facts is actually the only way that a full review of the issues can be obtained, and if the Court does not take the opportunity to do so the very substantial issues shall be repeated while evading review. *Roe v. Wade*, 410 U.S. at 125; see, *In the Matter of Conroy*, 486 A.2d 1209, 1219 (1985). Certainly, this Court had the discretion, in October of 1992, when it reviewed the petition in the child's case to wait until all issues as to both the father and child were the subject of a final order entered by the New Jersey Supreme Court. That did not occur until March 11, 1993. As a practical matter, this has always been only one case.

II. J.M.'S PETITION PRESENTS MERITORIOUS ISSUES WHICH HAVE NEVER BEEN DECIDED BY THIS COURT AND ISSUES THAT ONLY THIS COURT CAN RESOLVE. ASPECTS OF RESPONDENT'S MOTION SERVES TO ILLUSTRATE WHY CERTIORARI SHOULD BE GRANTED IN THIS CASE.

A.

On this motion J.M. relies upon the substantive arguments found in his petition and Reply Brief. V.C.'s arguments on this

[2] The public interest always bears upon matters pertaining to the relaxation of procedural rules and bars of all types which would otherwise frustrate the review of matters that affect the public interest. See, *Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth*, 262 A.2d 881 (1970); *DeSimone v. Greater Englewood Housing Co.*, 267 A.2d 50 (1970); *Enourato v. N.J. Buildg.*, 440 A.2d 42 (1981) aff'd 448 A.2d 449 (1982); *In the Matter of Baby M*, 537 A.2d 1237, 1263-1264 (1988); *Hudson City v. Hampton Gardens Ltd.*, 438 A.2d 323, 327 n 5 (1981); *Gilborges v. Wallace*, 379 A.2d 269 (1977); *Atlantic City Casino Assoc. v. Kimmelman*, 508 A.2d 203 (1985); *Morales v. Cty of Hudson*, 566 A.2d 191, 198 (1989); *State v. Maure*, 573 A.2d 186 (1990); and *State v. Davis*, 477 A.2d 308 (1984).

motion actually underscore the reasons why the writ should be granted in this case: the prior case law simply bears no relevance to the substantive issues of when life begins and whether a child possesses rights prior to birth based upon the child's personal interest in life. The non-responsive nature of V.C.'s briefs reflects the fact that the "state's rights" genre of cases (now arguably exhaustive on questions concerning a woman's privacy interest when examined independently of the child's rights) never decided the issues presented by this case. Only if it is irrelevant that abortion is the intended, unjustified, and painful termination of the life of a human being, and these sentiments - that these facts are irrelevant to justice - have been expressed by this Court in past opinions, can V.C.'s motion be granted. Otherwise, the writ of certiorari should be granted and the Court should review this case.

B.

There is a lack of reason in respondent's argument which requires comment. V.C.'s attorneys argue that J.M. should be punished for: [1] pursuing a "crusade";[3] and [2] "advanc[ing] a personal agenda",[4] and sanctions should be imposed to "deter",[5] (presumably others) from attempting to have this Court address the substantive issues this case presents.

[3] P. 3 of moving papers, attorneys state: "continuing his crusade, on March 25, 1992 ..."

[4] P. 6 at top of V.C.'s moving papers.

[5] P. 6 of V.C.'s moving papers.

The emotionalism underlying these insensitive remarks illustrates an important reason why certiorari should be granted. What is called a "crusade" was on March 25, 1992, J.M.'s last effort to save the life of his child when neither he nor his attorney yet knew that the child's life had been terminated [see affidavit of J.M. found in appendix to this brief at A-1 to A-4; see also affidavit of Harold J. Cassidy at A-5 to A-13]. To find any reasonable interpretation in these remarks one must recognize that there is a deep and broad divide between J.M.'s knowledge that his was an attempt to save the actual life of a human being to whom he had responsibility, while respondent's attorneys are apparently reacting to an abstraction that is neither human, nor of value.

It is ironic that the attorneys from the Center for Reproductive Law and Policy would accuse an anonymous man, motivated by love, and a sense of obligation (see affidavit of J.M. at A-1 to A-4), as the party to this suit who is pursuing an agenda or crusade. It is the opposite of the reality. J.M. had a personal stake in a personal tragedy. He seeks only to have his case reviewed.[6]

[6] By contrast, the Center for Reproductive Law and Policy exists for the purpose of the promulgating what may be viewed as an extreme point of view. *The Center For Reproductive Law and Policy*, formerly a part of the A.C.L.U. has been involved in a significant amount of the pregnancy litigation in the past. Its involvement in similar litigation makes their statements that they thought this case would be over on March 24, 1992, [and that continuing it is a "crusade"] not only odd but incredible. Indeed, *The Center For Reproductive Law and Policy* is involved in representing the plaintiff in the matter of *Leona Benton v. David Kessler*, in which a woman is suing the Commissioner of the F.D.A. because a drug known as RU-486 ("morning after pills") was taken from her at Kennedy Airport in July 1992. She did not take the drug while in

The differences between the perspective of the two litigants is that one understands that the child is an actual human being to whom both parents have obligations. The respondent's attorneys argue from a narrow perspective which focuses only on some interests of a woman, seen in a vacuum, without regard to her other interests, and the interest of the child in life.

As long as the focus of the legal inquiry is the narrow one of government interfering with a woman's private life, the emotion expressed by V.C.'s attorneys is understandable. In that context any questioning of a woman's freedom will be met with an intolerance stemming from a justifiable insistence upon respect for the equality of women and an end to discrimination of women in society generally.

This narrow focus which ignores the children, many of whom are female (who may become specific targets of abortion based on gender), and fails to consider a woman's dignity and interests as mother, creates the paradox that many women - some have suggested most women - feel that the institution of abortion is the ultimate exploitation of women and the suggestion that women need a "right"

Europe or on the plane home in order to create a "test" case with the assistance of defendant's lawyers from *The Center For Reproductive Law and Policy*. The stay of the government's action was denied by the United States Supreme Court. U.S. Sup. Ct., A-40, July 17, 1992, 112 S.Ct. 2921. Although the plaintiff in that case asserts that she had a surgical abortion following the denial of the stay, *The Center For Reproductive Law and Policy* is pursuing the matter in the United States Court of Appeals for the Second Circuit. The Center's "agenda" driven litigation is in stark contrast to the personal nature of J.M.'s case.

to kill their own children to achieve equality is degrading.[7] These contradictions can only be resolved by this Court examining the rights of a mother in the context of the child's interest in life, and by moving beyond the narrow inquiry, on which V.C. focuses, of some of a woman's interests weighed against the narrowly defined interest of the state.

III. THIS CASE PRESENTS THE BEST OPPORTUNITY FOR THIS COURT TO REVIEW THE SUBSTANTIVE ISSUES IT DIRECTLY PRESENTS, INCLUDING: WHEN DOES THE LIFE OF THE CHILD BEGIN AND WHETHER THE CHILD HAS RIGHTS PRIOR TO BIRTH.

It appears that this particular case presents the best and most important opportunity for this Court to resolve the questions previously unresolved by this Court, including when the life of the child begins, whether the child has rights prior to birth, whether a mother's interests identified by *Roe* give rise to a right to abortion when balanced against the child's personal interest in life, and whether a father has standing to litigate his child's rights. There are at least seven reasons why this case constitutes the best opportunity for the court to decide these issues.

First, the timing of the case is important. This petition comes to the Court after the state's interest cases have been exhausted (e.g. *Casey*, *Guam*, *Louisiana* etc.). The most significant aspects of the balancing of a woman's privacy interest against the generalized interest of a state have been, apparently, finally resolved. Only questions relating to the child's rights remain.

[7] See Amicus Brief of Feminists for Life, et al, *Bray v. Alexandria Hewelth Clinic*, U.S. Sup. Ct. Docket Number 90-985 (1991)

These questions are best determined in the context of the personal interest in life of a particular child. It would also seem highly unlikely that a state would now pass legislation which directly implicates the child's interest, or attempts to protect the child's personal interest in life.[8]

Second, the fact that New Jersey authorizes terminations of the children's lives both before and after "viability" presents questions that cases from other jurisdictions would not present. The obvious humanity of the child after viability and the obvious cruelty of unjustified dismemberment and death of these children require this court to review the rights of these children now. The New Jersey Supreme Court has made it clear that it believes that these issues are only within the province of the nation's highest court. It is fair to infer that the New Jersey Courts will be guided by what this Court does on this petition. It is highly unlikely that a future litigant, in New Jersey, would be permitted to make an adequate record for review by this Court, or obtain an injunction of an abortion for any period of time.

Third, this case includes the history of an entry of an injunction. Although there is "state action" without the entry of this injunction, (and the "state action" analysis absent the

[8] The timing of the case also seems important because it would only be just if the child's rights are reviewed before the realization of imminent social conduct that will seriously compromise those rights. The so-called "morning after pill" may be approved for marketing within a year. The practice of surrogate mothering is in its infancy, and granting rights to terminate the life of the child to a mother in such a circumstance may result in cruel, offensive and unjustifiable harm (see, Pet. p. 51-52).

injunction is an important one in determining the ultimate consequences of a finding that the child possesses rights prior to birth) the issuance of the injunction places beyond doubt the existence of state action, which is important on the review of a petition for certiorari in the effort to avoid issuance of improvident writs. If certiorari is denied in this case, it is unlikely that another case shall be presented to this Court with the prior entry of an injunction, and surely little or no chance that an injunction would be entered in a New Jersey case or another state which authorizes post "viability" terminations.

Fourth, the record in this case is impeccable in terms of preservation of all of the pertinent issues, and direct preservation of the scientific and medical record. All of the issues and the scientific and medical arguments were not only preserved, but in every instance the issues and scientific documentation was filed with express leave of the New Jersey Supreme Court. It is especially advantageous that the scientific and medical arguments were preserved without this Court being burdened at this point with findings of fact. This Court could never be bound by a state's finding on the question of when the life of a child began because of the implications such a finding would have for the substantive constitutional rights of the parties. In fact state legislatures (and a United States Senate Committee) have held extensive hearings resulting in findings that the life of a child begins at conception. This court has rejected the authority of those political bodies to bind this Court, and it

is clear this Court reserves the power to determine when life begins to itself. The record in this case provides the flexibility needed for this Court to arrive at the truth and to do justice.

Fifth, while it is demonstrably preferable, and perhaps even necessary, for this Court's jurisdiction, that the issues be directly litigated by the mother, child and father, the procedural path to this Court is especially difficult emotionally for the litigants (see affidavit of J.M.) and constitutes a financial hardship. It is simply unfair to all of the children now conceived, and those to be conceived in the near future to require them and their parents to follow the painful path J.M. and the child followed to obtain a fair review of a case sometime in the future. In addition, denial of certiorari in this case would make preservation of a record in the future more difficult.

Sixth, the procedure employed by the New Jersey Courts in this case is, in retrospect, probably the best one to result in a reviewable record. Clearly, the State Supreme Court felt absolutely bound to vacate the injunction under the current case law. Under such circumstances there can never be a fact finding trial in a state court unless this Court directs that it be provided. At the same time, the New Jersey Courts allowed the petitioner to make his record on the issues and the scientific facts so this petition could be presented. In retrospect it is probably the only way the New Jersey Supreme Court could both give this Court an opportunity to review the legal issues, while being true to its obligation to follow what it interprets this Courts'

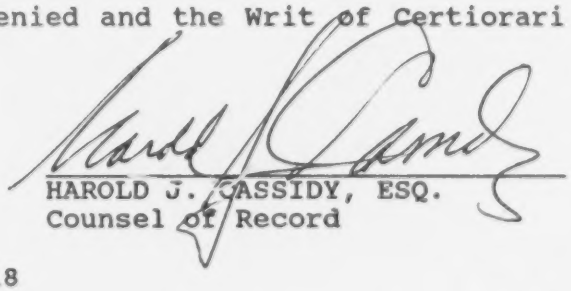
prior holdings.

Seventh and lastly, J.M. respectfully suggests that repose in the law can be achieved only after the rights of the child, as a legal issue, is determined by this Court, no matter how the Court rules. No case will more directly present those issues than a civil suit between two parents who disagree on whether their child should live or die.

CONCLUSION

This being the best opportunity for the issues to be determined by this Court, V.C.'s Motion for Sanctions and damages must be denied.

This court now has uncontroverted jurisdiction of this case under 28 U.S.C. §1257. The filing of a prior petition for discretionary review is irrelevant to both the court's jurisdiction and the merits of this petition. J.M.'s petition presents meritorious issues which have never been decided by this court and issues that only this court can resolve. Respondent's attorneys' emotional rhetoric serves to illustrate why certiorari should be granted in this case. This case presents the best opportunity for this court to review the substantive issues it directly presents, including: when does the life of the child begin and whether the child has rights prior to birth. The Motion of V.C. seeking sanctions and damages must be denied and the Writ of Certiorari should be granted.



HAROLD J. CASSIDY, ESQ.
Counsel of Record

TABLE OF CONTENTS FOR APPENDIX

Affidavit of J.M. A-1

Affidavit of Harold J. Cassidy, Esq. A-5

Transcript of Proceedings
Superior Court of New Jersey
Chancery Division - March 19, 1992 . . . . . A-14

Portion of Brief of J.M. Filed in
New Jersey Supreme Court on Motion
for Leave to File Overlength Brief
on Appeal to that Court A-19

No. 92-1934

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

J.M., Individually

Petitioner,

-against-

V.C.,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of New Jersey

AFFIDAVIT OF THE PETITIONER, J.M. IN OPPOSITION TO RESPONDENT'S MOTION FOR SANCTIONS

J.M., being of full age, deposes and says:

1. I am in fact the petitioner in this matter whose identity is disclosed in papers under seal with the New Jersey Supreme Court (and lower courts). I prepare and sign this Affidavit with the assistance and in the presence of Mr. Cassidy to whom I am well known and recognized since he has been my attorney since the beginning of this lawsuit. I submit this affidavit in opposition to a motion by V.C.'s attorneys seeking sanctions and damages against my lawyer and perhaps even myself.

2. When I first consulted Mr. Cassidy on March 6 and 7, 1992 I sought the services of a lawyer because V.C. and I had a new child whose actual life was real and irreplaceable. It was not

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possible for me to personally deny the reality that I had obligations to our child, and that the baby was a real, living individual human being. Mr. Cassidy was referred to me by another lawyer in private practice in Monmouth County.

3. Although I was sad that V.C. and I were in disagreement over whether our child should live or die, I knew that the child's life had to be weighed against any of the concerns or perceived problems that V.C. faced. I certainly was not, and am not now, in a position to make judgments for V.C. that are legitimately hers alone, nor do I wish to do so. My concern was primarily that of the welfare of our child and I concluded that before the child's life was taken a Court somewhere should make a judgment on whether it was right that the child should die and balance the right that the child has in life against any considerations that could be used to justify killing the child. There were no medical complications or any other circumstance that could possibly justify the taking of the life of a human being.

4. For me to fail to ask the Court to protect the life of our child would be for me to be in complicity with those who would take the child's life. That was not something that I could do, nor did I think that it was "frivolous" to ask the court, before our child was allowed to be killed, whether the child was a human being with rights. Even if it would be difficult to discharge my responsibility, it was impossible for me to ignore my obligation. If concern for my child's life and my knowledge that the child's life had value equal to other lives, is "frivolous," then I am guilty of presenting a "frivolous" issue to the court. If, on the

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other hand, a child's life is not frivolous then I ask this Court to take this case and review the issues it presents.

5. When my lawyer told me that the Court had continued the restraints on March 19, 1992 I was overtaken by emotion. I felt joy, and relief. When I learned that the child's life was lost I wept. I had my own sense of guilt concerning that loss. I felt the loss of our child, and the mourning I experienced was the same as losing any member of my family.

6. When I was told that the baby's remains could not be given to me for a proper burial, I arranged for a private service at a church in Monmouth County, New Jersey. A small group of my family was present.

7. I have seen that all three of us - V.C., our child, and myself - have suffered as a result of this abortion "right". There is a prior affidavit in the record in this case concerning V.C.'s decision not to terminate the life of our second child. Her suffering because of the abortion should be apparent. For the sake of our new daughter (born in February 1993) I urge that the identity of V.C. and myself never be revealed publicly. The suffering that I witnessed and experienced during this case should be for a constructive purpose.

8. Shortly after I learned of our child's death through the abortion I determined to see this case through to the end to give this Court an opportunity to examine and decide the issues this case presents. I did not think that this opportunity to decide these issues should be lost. No one else should be required to experience the pain and personal sacrifice that has been

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experienced by V.C., our child and myself so that these issues can be decided. I went through this case to the end so other children, mothers and fathers do not have to have this dreadful experience.

9. When I determined to see this case through to the end, I felt that it was my obligation to do so even though our own child was lost. For one thing, it seemed that after the original order of the New Jersey Supreme Court had been entered and our child's life taken, it was wrong that a final determination should rest with a state court, the final determination of which would ensure the continued death of children such as ours. It was most appropriate that the determination of the important questions of Federal constitutional rights should, and could, rest only with the United States Supreme Court. It seemed to me that it was my obligation to see that the issues be presented to this Court for the benefit of all the other children, and their mothers, and fathers.

10. If my concerns for the life of our child are not "frivolous", that the case does not present frivolous issues, and that they are not issues that have been directly decided before, than I respectfully ask this court to review this case and decide these issues, now, so that no other litigants must be asked to go through what our child went through, what V.C. has gone through and what I have gone through so that this society, this court and this nation can decide these issues.

J.M.

Sworn to and subscribed to before me this 17th day of August, 1992.

HAROLD J. CASSIDY, ESQ.
Attorney at Law State of New Jersey

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No. 92-1934

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

J.M., Individually

Petitioner,

-against-

V.C.,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of

AFFIDAVIT OF PETITIONER'S COUNSEL HAROLD J. CASSIDY IN OPPOSITION TO RESPONDENT'S MOTION FOR SANCTIONS

HAROLD J. CASSIDY, being of full age, deposes and says:

1. I am an attorney at law in the State of New Jersey licensed to practice before this Court. I am a member of the law firm of Cassidy, Foss and San Filippo with offices at 225 Broad Street, Red Bank, 07701. I am the counsel of record in the matter of J.M. v. V.C. and I am thoroughly familiar with all aspects of this case from its inception to the present time.

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2. I submit this Affidavit in opposition to a motion filed by the attorneys for the respondent, V.C. Naturally, since the merits of the petition are the subject matter of this motion, petitioner relies upon the petition and J.M.'s reply brief which have been filed with the Court. In addition, J.M. submits a brief in opposition to the motion for sanctions and this affidavit together with the affidavit signed by the petitioner, J.M., setting forth facts which are relevant to the application for sanctions. I certify that J.M., who signed this Affidavit by his initials, is indeed the party litigant to this action. The true identity of J.M. is not contained in the appendix but has been protected by the Order of the courts. The true identity of J.M. and V.C. are found in the documents under seal with the New Jersey Supreme Court. If Certiorari is granted in this case, those sealed documents undoubtedly will be provided to this Court. J.M. signed the Affidavit in my presence in my Red Bank office.

A FATHER'S CONCERN FOR THE LIFE OF HIS CHILD

3. J.M. first contacted and spoke to me in the early evening of Friday, March 6, 1992. I spoke with him in person for the first time on Saturday, March 7, 1992 and I filed the complaint on J.M.'s behalf on Monday morning March 9, 1992. When he first spoke to me on March 6 and 7, 1992, J.M.'s only concern was the welfare of his child. He was obviously distraught over the prospect of the child's life being taken, and all of his statements demonstrated he was motivated by nothing other than a sense of obligation to his child.

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4. J.M. expressed relief by the entry of the order prohibiting the termination of the child's life entered on March 9, 1992. On March 19, 1992 J.M. was at the court house when the Chancery Court refused to vacate the restraint. When I told him that the court had continued the restraints, he became tearful. He expressed joy and relief. He told me that he hoped the case would end at that point and that he and V.C. would raise the child together. He was very emotional and very moved because he thought the child's life might be saved. When the New Jersey Supreme Court vacated the restraints on March 24, 1992 his sadness was very evident. I received word of the Supreme Court's decision late in the afternoon. J.M. and I discussed my preparing papers to file in the United States Supreme Court early the next morning in a last effort to save the child. We had no way of knowing if V.C. would or could be able to terminate the child's life on March 24. I worked late to prepare the application for a stay. I awoke early and drove four hours to Washington, D.C. where I arrived about 9:30 a.m. It was not until the late afternoon of March 25 that I learned that V.C. terminated the child's life late on March 24. I first received this news from a local newspaper reporter who had spoken to V.C.'s attorneys after they issued, unbeknownst to me, a press release. Late in the day on March 25, 1992, I told J.M. that V.C.'s attorneys had indicated that the child's life was terminated. J.M. wept. Within the next day or two he spoke to me on three or four separate occasions. He demonstrated a deep sense of loss, and grief.

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5. On March 26 or 27, 1992 J.M. called me and asked if I could arrange for him to secure the child's remains so that the child could be given a proper burial. I did not encourage him to think that that would be possible, but because of his request I contacted V.C.'s attorneys, and I asked that the child's remains be released to him so that he could give the child a proper burial. When the child's remains were not released to him he expressed sadness. A week or so thereafter he told me that a private service was conducted for the child with a member of the clergy and some of his family present.

6. Had V.C.'s attorneys not filed a motion calling J.M.'s petition frivolous and seeking damages these facts would not be put into this record. It was only after J.M. experienced the very deep and personal sense of loss on March 25, 26 and 27 that he could consider whether to continue the litigation in order to have the courts review the issues he presented in the hope that others would not have to suffer what the child, J.M., and V.C. have suffered. Although many people and many organizations, have expressed support for J.M.'s position on the issues in this case, since the case became public following V.C.'s attorneys' press release, and many have filed amicus curiae briefs, no person and no organization has contributed to the cost of the litigation of this case [except for some direct payments to a printer, which represent less than four percent of the overall expense of J.M.'s litigation; there have also been in-kind services of scientists, doctors, and lawyers].

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THE PROCEDURE IN THIS CASE

7. Beginning on March 9, 1992 when this case began, I used every effort to protect the identities of J.M. and V.C., not only for the sake of the mother and father, but also for the sake of the child. This was something that J.M. wanted very much. The record in this case will reflect that when the Chancery Judge denied J.M.'s original application to protect the identities of the litigants, he moved before the Appellate Division on an emergent application to appeal that interlocutory order. As a result of J.M.'s application, the Appellate Division directed that this matter proceed under the initials of the litigants for the protection of all involved. During a period from March 9 to March 24, 1992 V.C.'s counsel was an attorney named Lewis Robertson, with the firm of Evans, Obsborne & Kreizman, maintaining offices in Little Silver, New Jersey. In one of our first conversations Mr. Robertson and I entered into a "gentlemen's agreement" that neither party would alert the media to this case in order to protect V.C., J.M. and the child. The lawsuit was, despite the magnitude and importance of the issues it presented, a private matter between V.C. and J.M. I honored my commitment not to alert the media to the case as did Mr. Robertson. I first became aware that the Center for Reproductive Law and Policy joined Mr. Robertson in representing V.C. on March 23, 1992 during our appearance in the Appellate Division. When I returned to my office late on March 25, 1992 I learned that V.C.'s new attorneys, the lawyers from The Center for Reproductive Law and Policy and Stryker, Tams & Dill, had prepared and issued a press release on

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March 24, 1992, following the New Jersey Supreme Court's decision, in contravention of our understanding and agreement. Consequently, stories concerning the case appeared in newspapers on March 25 and March 26. As a result of V.C.'s attorneys issuing a press release I received calls from a number of newspapers and radio stations. Any subsequent newspaper stories in the local papers were a direct result of V.C.'s attorneys issuing the press release. Public discussion of the issues presented by this case is by no means improper, but J.M. has never granted an interview with anyone in connection with this case and he has expressly advised me he never will, even as long as he lives. In fact, he is extremely concerned about protecting the identity of V.C. and himself for the sake of their new child born in February 1993. To my knowledge J.M.'s identity is totally unknown to the media. If certiorari is granted, the petitioner requests that the protective Order of the New Jersey Court be continued.

8. As a result of the orders of the New Jersey Supreme Court entered on March 24, 1992, the portion of the case presented as the "child's case" (although no guardian ad litem had ever been appointed), was dismissed without explanation. The father's individual claim and, for all practical purposes, the entire case, was not reviewed by any of New Jersey's appellate courts and the case remained in the Chancery Court awaiting the start of an entire appellate review. The "child's case" was never given an appeal, the Appellate Division refusing to grant leave to appeal, and the New Jersey Supreme Court vacating the restraints within hours. Yet this posed a procedural difficulty for J.M. The lower court, which

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had dismissed J.M.'s case, had ruled that he had no standing and no right to act as guardian ad litem for the child. The court did not appoint a guardian and the matter proceeded rapidly through the appellate courts without any appointment (the Supreme Court order was entered only five days after the Chancery Court's March 19 order). The effect of the New Jersey Supreme Court's order was to prevent the appointment of any guardian and to completely deny review. Although J.M. and his child were two separate individuals, each with the right to prosecute the rights of the child (including the right of the child to have his or her father be appointed as guardian ad litem), the child was treated as non-existent. It was not possible to determine exactly how this or any other court would treat this unusual bifurcation in terms of the "finality" requirement of 28 U.S.C. §1257. We filed a petition in this Court in the summer of 1992 in the "child's case" because it was prudent, and necessary to guard against the eventuality that, by not having done so, V.C.'s attorneys would argue that the right to petition the Court was waived. J.M. was presented with a procedural dilema because the child, even if recognized, did not, under New Jersey law, have the legal capacity to maintain a lawsuit without the appointment of a guardian ad litem, the child had died, V.C.'s attorney argued that perhaps the child had never existed, and the State Court ruled J.M. could not prosecute the child's case. As a practical matter J.M. simply sought to protect the opportunity to have his case reviewed at least once. Under New Jersey law J.M. had his own right to litigate all the same issues concerning the child's rights (see brief submitted in opposition to the motion).

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Because the child's case was filed with the United States Supreme Court, J.M. was compelled to present J.M.'s individual case at the same time, even though under New Jersey law the Chancery Division order was not a final order. This Court could have chosen to grant certiorari in its discretion (even if the Court does not customarily exercise the jurisdiction described in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 459, i.e., treating non-final lower state court orders as "final"). In any event, the Court did not exercise its discretion under *Cox*. Clearly, J.M. can now file a petition because the highest court in the State of New Jersey ruled on his individual case in a final fashion under both state law and §1257. (see pet. Br. in opposition to motion under Point I.)

THE MOTION OF V.C. FOR SANCTION AND DAMAGES

9. The motion filed by V.C.'s attorneys, who include The Center For Reproductive Law and Policy, is replete with emotional rhetoric. The motion is an express effort to discourage future litigation on this topic before this Court. We infer that the emotionalism derives from a heartfelt and sincere belief that a woman's right to equality must be safeguarded, and the historical exploitation of women in this country brought to an end. Those of us who have worked professionally over the years in support of this objective can seek no end inconsistent with it. However, an objective, intelligent, and responsible analysis of the issues presented by J.M. demonstrates that J.M.'s arguments are not inconsistent with the goal of achieving equality for women. To the contrary. Among the large number of women who have expressed support for J.M.'s case, including the 24 or 25 women's

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organizations who have joined friend of the court briefs, are many who have expressed the belief that abortion is the ultimate exploitation of women. Many friends of the court (and potential friends of the court) have expressed a desire to have the opportunity to address this Court on precisely these issues as well as the belief that a woman's real rights cannot be defined without examining all of a woman's interests, those of her child and the mother's obligation to her child.

10. I hereby certify that the foregoing statements made by me are true. I understand that if any of the statements made by me are willfully false, I am subject to punishment.

HAROLD J. CASSIDY, ESQ.

Sworn to before me this
27th day of August 1993.

Attorney at Law
State of New Jersey

Philip E. San Filippo, Esq.
Attorney at Law
of New Jersey

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Transcript of Proceedings
Superior Court of New Jersey
Chancery Division - March 19, 1992

P. 20 l. 6 to l. 9

THE COURT: I've already indicated that somebody is going to be a guardian ad litem. It doesn't make any difference to me if he is because who is going to be the somebody it's the lawyer that's going to do the work.

P. 27 l. 6 to p. 28 l. 11

THE COURT: As far as the husband (sic), I think we're finished with him. I've ruled on him.

I guess my question is do you think that I have or do not have the power to appoint a guardian ad litem under these circumstances. (emphasis not in original)

MR. ROBERTSON: I think that you do not have it. The reason that I say that is that *although the answer, the scientific answer to the question when life begins is probably certainly part of the calculus for purposes of determining who's a person within the meaning of 14th amendment,* there is much more involved than simply a scientific inquiry.(emphasis not in original)

THE COURT: I think I noted that at the beginning. I talked about life and then person.

MR. ROBERTSON: Right. And as I understand the argument, the

thrust of the argument of the plaintiff, the plaintiff it seems would suggest that because science can demonstrate, at least according to one theory or one school of thought that life begins at conception, ergo a fetus is a person within the meaning of the 14th amendment and I think that's much too much of a leap.

THE COURT: Only if the court says so.

MR. ROBERTSON: That's right, only if the court says so.

THE COURT: Are we going to have, if we go forward in this case, some opposing views? *It's a fact issue* (emphasis not in original).

MR. ROBERTSON: *I think a mixed question of law and facts.*

THE COURT: *By golly there is a fact in there.*

MR. ROBERTSON: *There certainly is.* (Emphasis not in original.)

P. 30 l. 3 to l. 8

THE COURT: It may be. But in the meanwhile *shouldn't I appoint the guardian ad litem to see if it can be demonstrated?* (Emphasis not in original.)

MR. ROBERTSON: Well, again, *I don't think the question is sufficiently relevant to warrant the appointment of the guardian ad litem in ...* (Emphasis not in original.)

P. 30 l. 14 to P. 31 l. 10

THE COURT: If you digress for a moment and say what we're talking about here, we're talking about what may be life. Maybe, and *if the fetus were asked would say you're talking about my life.* (Emphasis not in original.)

And the real contest that people don't seem to address is the contest between the *mother who has her problem and if there is life, the fetus who's saying nobody is defending my life.* (Emphasis not in original.) Because if it's defended, if somebody defends it successfully, then I'm born.

And the question is, is there a constitutional right to that fetus to be considered a person for constitutional purposes. But fundamental to personhood is, I think, life. And, therefore, shouldn't I give, in a sense, the fetus a chance to demonstrate that it's life.

MR. ROBERTSON: Again, the only answer I could give you is that no court has ever held that a fetus is a person.

THE COURT: Right, and you're absolutely correct, but precisely I think because the fundamental issue of life and when it begins has not been given a test in the courtroom *and in a factual circumstances where somebody has ruled yes or no.* (Emphasis not in original.)

P. 42 l. 13 to l. 24

THE COURT: The injunctive order is effectively to V.C. don't abort that, I'll say fetus because that's a neutral term. Should that injunction continue to remain in place.

That depends on whether or not we have a lawsuit because if I do not appoint a guardian ad litem or say to J.M. that while you designate yourself guardian ad litem of the unborn, that's not real.

If I don't do that, then we have no case and if we have no case we have no injunction. Emphasis not in original.) It's true that the U.S. Supreme Court has not ruled on the issue at least in Roe v. Wade, it doesn't.

It specifically left the field open.

P. 49 l. 7 to p. 50 l. 17

THE COURT: Now, the probability of ultimate success. That's a mixed question. *It's a mixed question of fact and law because I keep saying what is there.* (Emphasis not in original.) I keep saying based upon what is before me and that's a one-sided presentation, I recognize. ... *in deciding this business of when does life begin.*

But I do know that the U.S. Supreme Court has never done that. I do know that the New Jersey Supreme Court has never done that. (Emphasis not in original.) Neither of those courts has had a record which is made in a trial court in a judicial fashion in

which the judge evaluates qualifications.

A judge evaluates the worth of testimony and a judge makes a call one way or the other. The judge can't sit and say we need not resolve the difficult question of when life begins. A trial Judge can't do that. The issue is there. The trial judge has to one way or other resolved it. ...That's what trial judges are. So our Supreme Court in Right to Choose v. Byrne states at page 299 of the opinion in 91 N.J. Reports, "We do not presume to answer the profound questions about the morale, medical and societal implications of abortions nor do we undertake to determine when life begins or at what point fetus is a person."

P. 51 l. 2 to l. 6

THE COURT: *The unborn has to prove, through its guardian ad litem, that it has life. It has to prove, through its guardian ad litem, at what point a court can say that life is equated with a person because there may be a difference between the two, I don't know.* (Emphasis not in original.)

P. 56 l. 9 to l. 25

MR. CASSIDY: Is it possible for you to just write plaintiff individually dismissed so that we have on order to deal with? I would appreciate it, Judge.

THE COURT: Further ordered the plaintiff's complaint shall not be dismissed, however, *J.M. as an individual does not have standing to prosecute the action.* Good enough?

MR. CASSIDY: Okay, then I would ask you to specifically *appoint him as guardian ad litem to prosecute on the action on behalf of the infant. (Emphasis not in original.)*

THE COURT: *I can only write so much. I will do that. I said I would probably do it. I'll say now that effectively the caption* is going to read J.M. as guardian ad litem. (Emphasis not in original.)

MR. CASSIDY: I'll submit a separate order.

THE COURT: If you want to clean it up and make it look nicer, that's okay.

PORTION OF BRIEF OF J.M. FILED IN NEW JERSEY SUPREME COURT ON MOTION FOR LEAVE TO FILE OVERLENGTH BRIEF ON APPEAL TO THAT COURT

ARGUMENT

INTRODUCTION

. . . In reply to V.C.'s opposition to J.M.'s motion for leave to file the brief already lodged with the Court, J.M. observes:

> [1] First, it is impossible for V.C. or anyone else, especially the people of the State, to say precisely what issue or issues were decided by this Court on March 24, 1992 when the child's complaint was dismissed;
>
> [2] The father's rights are separate from those of the child and include his right to act as guardian and his standing to prosecute the child's action [which implicates the question of whether there is a child in fact, and which of the child's rights he may prosecute];
>
> [3] If there are some issues which overlap with those decided in the child's case, neither the doctrine of res adjudicata nor collateral estoppel bar J.M. from litigating them;
>
> [4] Even if, under normal circumstances a bar to relitigation existed (which it does not), the Court must permit J.M.'s litigation of the issue because (a) the issues are of such public importance that a decision must be reached for the guidance of the legislature, the Courts and resolution of the public interest, and (b) the Court, perhaps because of the special circumstances on March 24, 1992, never issued an opinion which addressed any issue in a substantive way which provided that guidance (so that an opinion in this case does not duplicate anything the Court has already written); and
>
> [5] V.C.'s personal position at this time is not inconvenienced, compromised or prejudiced, so all the issues raised by J.M.'s individual appeal is not only appropriate, but probably constitutes the only effective means for the New Jersey Supreme Court to ever have an opportunity to substantively rule on these important public issues in the context of a civil case.

For each of these separate reasons, and for all of them collectively, J.M.'s motion for leave to file an overlength brief should be granted. J.M. requests that the Court refer to the brief on the merits in determining this motion.

POINT I

J.M.'S INDIVIDUAL RIGHTS WERE NOT PREVIOUSLY ADDRESSED BY THIS COURT, INCLUDING HIS RIGHT TO ACT AS GUARDIAN AD LITEM, AND HIS STANDING TO PROSECUTE HIS CHILD'S CASE. THE COURT CLEARLY DID NOT ADDRESS THE QUESTION OF WHETHER A CHILD IN FACT EXISTED, OR WHICH OF THE CHILD'S RIGHTS J.M. HAD STANDING TO PROSECUTE. IN ADDITION, NEITHER V.C.'S ATTORNEYS NOR THE PUBLIC CAN KNOW WHICH ISSUE WAS DECIDED BY THE COURT IN THE CHILD'S CASE ON MARCH 24, 1992 THAT COULD FORM THE BASIS FOR V.C.'S PRECLUSION ARGUMENT.

V.C.'s attorneys argue that the plaintiff should not be granted leave to file his overlength brief because, they contend, that J.M.'s individual claim includes issues which the Supreme Court of New Jersey decided in the child's case. See Db 8-3 to 4. A brief reply is necessary to clarify that [1] the father's issues are separate, largely different, and previously undecided; and [2] to the extent there may be some issue or issues that overlap, neither V.C. nor the public could possibly know which issue, the reasoning of the Court, or whether it applies to J.M.'s individual claim.

Firstly, J.M.'s individual state and federal constitutional rights have never been decided by this Court. He raised five separate rights each of which can only be determined in conjunction with the question of whether the child is a human being prior to birth [from conception or otherwise]: his right to defend the life of his child, his right to companionship with the child, his right

to discharge his obligations to his child, and his right to equal protection of the laws. In addition, as part of these rights (and as part of the child's rights) he possesses the rights to be the guardian ad litem of his child before birth and to have the standing to prosecute the child's action. All of these rights were raised with the Chancery Division and all of them were dismissed by that Court. The legal argument concerning each of them is contained in J.M.'s brief on the merits lodged with the Court which is the subject of this motion. These issues are important to the public interest, are complex in nature and require the space devoted to them for their substantive development.

The New Jersey Supreme Court clearly did not reach a decision concerning the existence of the child in this context. The Court specifically declined to address the question. See, Order, Pa. 71. Whether this is a child, a human being relates to J.M.'s individual rights including his right to defend the child's life.[10] It also relates directly to the questions of whether he has the right to act as guardian ad litem, and has standing to prosecute the child's rights. The scientific material contained in the brief directly relates to each of the rights of J.M.

The only issues of potential overlap with the Order of March

[10] This after all, is the basis for a state to prohibit abortion after viability. The state has an interest under *Roe* to protect "life" or "potential life". In *Roe* the U.S. Supreme Court recognized that the state could raise the issue of the child's individual rights. Whether a father has an interest to protect the life of his child is an issue here, where the state fails to act. Like a state with a valid interest, the father, if this is a child, has an interest to raise the child's right.

24, 1992 concern the question of whether the child has state or federal rights prior to birth and if so which of these rights does J.M. have standing to prosecute.

Clearly, neither V.C.'s attorney nor the public can possible determine which issue was decisive on March 24, 1992 in the child's case and therefore there is no sound basis for her preclusion argument (inappropriate at this juncture).

Firstly, V.C. cannot say whether the Court determined the child's case on state or federal grounds, since the court did explain any reasoning or cite specific authority. Clearly some of J.M.'s rights involve federal issues which supersede the state, but other state issues are unaffected by the federal ones. J.M. is entitled to litigate the question of which of the child's rights he has a right to litigate. A res adjudicata or collateral estoppel argument requires a definitive statement of the court as a basis for it. Although some issues presented in J.M.'s individual case are the same as some which were argued to the Court on the child's case, the circumstances that existed prevented the litigant from obtaining, and the court providing, a full and complete determination of the issues. See, *Zoneraich v. Overlook*, 212 N.J.Su. 83, 94, 95 (App. Div. 1986).

POINT II

EVEN IF THERE ARE ANY ISSUES IN J.M.'S INDIVIDUAL CASE WHICH OVERLAP WITH THOSE OF THE CHILD (IF THEY CAN BE IDENTIFIED), NEITHER THE DOCTRINES OF RES ADJUDICATA NOR COLLATERAL ESTOPPEL BAR J.M. INDIVIDUALLY FROM ARGUING THE ISSUES AS THEY RELATE TO HIS OWN RIGHTS. THE PUBLIC IMPORTANCE OF THE ISSUES REQUIRE ANY BAR TO THE PLAINTIFF THAT WOULD OTHERWISE EXIST TO BE RELAXED. IN ADDITION, THE PROCEDURE EMPLOYED IN THIS CASE IS PROBABLY THE ONLY

EFFECTIVE MEANS FOR THE NEW JERSEY SUPREME COURT TO EVER REVIEW THE ISSUES PRESENTED BY THIS CASE AND THE SITUATION COULD BE REPEATED YET EVADE REVIEW.

1.

Although the defendant doesn't articulate her argument as one of res adjudicata or collateral estoppel, and cites no authority which supports a bar to J.M. individually litigating the issues presented in his brief, the tone or character of her argument requires a brief comment on why those doctrines do not apply to this case.

In theory, the only issues which could overlap between the two cases concerns the precise right of the child or mother which determine the outcome of the child's case, although none were identified by the Court on March 24, 1992. As a general proposition, adjudication of an issue or claim does not, by operation of res adjudicata or collateral estoppel, bar a person not a party or privy to a party to the prior action from seeking another adjudication of the issue or claim because every person is entitled to his day in court. *Brunetti v. New Milford*, 68 N.J. 576, 587(1975); *Bd. of Directors, Ajax, etc. v. First Nat'l. Bank of Princeton*, 33 N.J. 456, 463(1960); *Lehigh Zinc and Iron Co. v. N.J. Zinc and Iron Co.*, 55 N.J.L. 350, 357 (E&A 1883); *Biddle v. Biddle*, 166 N.J.Su. 1, 5 (App. Div. 1979). J.M. is a separate individual from his child with a separate interest. In order for him to litigate his own interests, the child's rights must be argued and decided. For example, when *Roe* was litigated the U.S. Supreme Court recognized the right of the State of Texas to raise the rights of the child,